SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 81

RECTOR SIMMONS, JR., ET UX,

Appellants,

v.

WEST HAVEN HOUSING AUTHORITY,

Appellee.

ON APPEAL FROM THE APPELLATE DIVISION OF THE CIRCUIT COURT OF THE STATE OF CONNECTICUT

BRIEF OF THE STATE OF CONNECTICUT, AMICUS CURIÆ IN SUPPORT OF APPELLEE, WITH WHOM THE LISTED STATES AND TERRITORY HAVE JOINED HEREIN AS AMICI CURIÆ

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INDEX

	Page
Interest of Amicus Curiae	1
Statement of the Case	2
Question Presented	2
Statute in Question	4
Summary of Argument	4
Argument	5
I. The surety bond requirement of Section 52-542, Connecticut General Statutes, is for the purpose of protecting a property owner from irreparable loss during the pendency of an appeal.	5
II. The surety bond requirement of Section 52-542, Connecticut General Statutes, is constitutional as applied in the case of an indigent tenant.	9
III. This case does not present a federal question.	12
Conclusion	13

TABLE OF AUTHORITIES CITED

Statutes	*Page*
Sec. 17-69, Conn. Gen. Stat.	7
Sec. 48-11, Conn. Gen. Stat.	7
Sec. 52-185, Conn. Gen. Stat.	7
Sec. 52-187, Conn. Gen. Stat.	7
Sec. 52-532, Conn. Gen. Stat.	6
Sec. 52-534, Conn. Gen. Stat.	6
Sec. 52-542, Conn. Gen. Stat.	4
Sec. 53-36a, Conn. Gen. Stat.	7
Connecticut Public Acts 1806	5
Art. First, Sec. 10, Constitution of Connecticut (1965)	8
Art. First, Sec. 11, Constitution of Connecticut (1965)	8
Art. Third, Sec. 2, Constitution of Connecticut (1965)	1
11 Geo. 2, c. 19 (1737)	5
Public Act No. 509 § 4 (1961 Session Conn. Gen. Ass.)	10
Statutes of Connecticut 1808	5
28 U.S.C. § 1446(d)	7
29 U.S.C. § 107	7
31 U.S.C. § 518	7
Fifth Amendment, U. S. Constitution	8
Fourteenth Amendment, U. S. Constitution	8

Other Authorities — *Page*

16 Am. Jur. 2d, *Constitutional Law*, § 535 8

Berger, *Land Ownership and Use* 5

4A C.J.S., *Appeal and Error*, § 502(b) 9

16A C.J.S., *Constitutional Law*, § 559 8

52 C.J.S., *Landlord and Tenant*, § 784(a) 10

Friedman, *"Public Housing and The Poor: An Overview"*, 54 Cal. L. Rev. 642 13

2 McAdam, *Landlord and Tenant*, (54th Ed.) § 269 5

Schoshinski: *"Remedies of the Indigent Tenant: Proposal For Change"*, 54 Geo. L. J. 519 13

2 Tiffany, *Landlord and Tenant*, (1912 Ed.) § 284 10

76 Yal. L. J. 545, *"The Indigent's Right to Counsel In Civil Cases"* 13

Cases — *Page*

Alpert v. *Peloquin*, 96 Conn. 626 6

Bennett v. *United Lumber & Supply Co.*, 110 Conn. 536 9

Booher v. *Lowe*, 79 Ohio App. 490 11

Bronson v. *Mechanics Bank*, 83 Conn. 128 9

Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541 8

Dooley v. *Town Plan & Zoning Commission*, 151 Conn. 304 8

Griffen v. *Illinois*, 351 U.S. 12 10

Harper v. *Virginia Board of Elections*, 383 U.S. 663 11

Higgins v. *Parker*, 48 Ill. 445 11

Hink v. *Bowlsby*, 199 Or. 238 11

Housing Authority v. *Jones*, 5 Conn. Cir. Ct. 350 11

Jensen v. *Nationwide Mutual Ins. Co.*, 147 Conn. 722 11

Jones v. *Union Guano Co.*, 264 U.S. 171 8

Kennedy v. *Walker*, 135 Conn. 262 9

Lane v. *Brown*, 372 U.S. 477 10

Lochner v. *New York*, 198 U.S. 45 11

Palmer v. *Des Reis*, 135 Conn. 388 10

Palmer v. *Des Reis*, 136 Conn. 627 10

Pollack v. *Ro-An of New England, Inc.*, 1 Conn. Cir. Ct. 173 10

Ricci v. *Bove's Estate*, 116 Vt. 335 11

Smith v. *Bennett*, 365 U.S. 708 10

State v. *Pallotti*, 119 Conn. 70 11

Thompson v. *Coe*, 96 Conn. 644 6

Waters-Pierce Oil Co. v. *State*, 107 Tex. 1 11

Williams v. *Shaffer*, 385 U.S. 1037 11

Winestine v. *Rose Cloak & Suit Co.*, 93 Conn. 633 6

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BRIEF OF THE STATE OF CONNECTICUT, AMICUS CURIÆ, IN SUPPORT OF APPELLEE

INTEREST OF AMICUS CURIÆ

This case involves the constitutionality of the surety bond requirement of Section 52-542 of the Connecticut General Statutes.

The General Assembly of the State of Connecticut adjourned by law on June 4, 1969 so that legislative redress is unavailable until it convenes in regular session on January 6, 1971.

> See: Constitution of Connecticut, Article Third, Section 2.

Because of the adverse effect upon civil process if this appeal is sustained, this brief is submitted in support of appellee seeking a dismissal of this appeal and the affirmance of the

decision of the Appellate Division of the Circuit Court of the State of Connecticut.

This brief of amici curiae is filed pursuant to Rule 42(4) of the United States Supreme Court on behalf of the State of Connecticut and the listed States and Territory which have substantially similar statutes and through their Attorneys General as shown below have joined Connecticut on this brief and appear as amici of the Court.

QUESTION PRESENTED

Does Section 52-542 of the Connecticut General Statutes, providing for a bond with surety on an appeal in a summary process action, violate the Equal Protection Clause of the United States Constitution?

STATEMENT OF THE CASE

The appellants entered into possession of the leased premises on November 1, 1966, under a written lease for a term of one month renewable for successive terms of one month each at a rental of $72 per month. On July 12, 1967 the appellee gave the appellants statutory notice to quit possession on or before July 18, 1967 for failure to pay the rent due for the months of May, June, and July 1967.

The appellants failed to quit possession and on July 19, 1967 the appellee filed a statutory summary process action for non-payment of rent. After a trial on the merits the Circuit Court, on January 16, 1968, entered a judgment of possession in favor of the appellee.

On January 18, 1968, appellants filed an appeal from the judgment of the Circuit Court with the Appellate Division of said Court and annexed thereto a motion to waive the surety bond required by Section 52-542 of the Connecticut General Statutes on the ground of alleged indigency.

The said motion to waive the surety bond on appeal was denied, the court finding that the appeal was not taken in good faith, but rather for the purposes of delay and obstruction. This decision was filed on January 19, 1968.

On January 24, 1968 the appellants filed a motion for review with the Appellate Division of the Circuit Court. On March 1, 1968 the Appellate Division denied the motion to review and dismissed the appeal.

On March 11, 1968, the appellants had filed a Petition for Certification in the Supreme Court of Connecticut for a review of the judgment of the Appellate Division of the Circuit Court dated March 1, 1968. On June 25, 1968 the Supreme Court of Connecticut entered an order denying certification.

On March 15, 1968 the appellee moved the Appellate Division of the Circuit Court to terminate the stay of execution of the judgment of possession entered by the trial court. This motion was granted on April 11, 1968. No appeal therefrom has been taken by the appellants.

To delay their eviction under the Circuit Court order of April 11, 1969, the appellants filed an injunctive action in the United States District Court for the District of Connecticut on April 19, 1968. On May 2, 1968, the District Court in a lengthy decision dismissed the federal complaint and appellants promptly appealed to the United States Court of Appeals (Second Circuit) on May 3, 1968. On July 10, 1968, the United States Court of Appeals (Second Circuit) dismissed appellants' federal complaint as moot.

The appellees obtained execution on the Circuit Court judgment of possession on July 26, 1968.

Notice of appeal to the Supreme Court of the United States was filed on June 27, 1968. A motion to stay enforcement of

the judgment of eviction was denied by Mr. Justice Harlan on July 16, 1968.

This Supreme Court noted probable jurisdiction on April 7, 1969.

STATUTE IN QUESTION

Section 52-542 of the Connecticut General Statutes, Revision of 1958, Revised to 1968, provides:

> **"Bond on appeal; stay of execution.**
>
> When any appeal is taken by the defendant in an action of summary process, he shall give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue or, where no lease had existed, for the reasonable value for such use and occupancy, during the pendency of such appeal, or which may be due at the time of its final disposal; and execution shall be stayed for five days from the date judgment has been rendered, but any Sunday or legal holiday intervening shall be excluded in computing such five days. No appeal shall be taken except within said period, and if an appeal is taken within said period execution shall be stayed until the final determination of the cause, unless it appears to the judge who tried the case that the appeal was taken for the purpose of delay; and if execution has not been stayed, as hereinbefore provided, execution may then issue, except as otherwise provided in sections 52-543 to 52-548, inclusive."

SUMMARY OF ARGUMENT

The surety bond requirement of Section 52-542 of the Connecticut General Statutes is constitutional on its face. When an indigent applies to the trial court for a waiver of this statutory requirement the court, assuming it has the equitable power to

waive the statute or impose substitute requirements, must first find that the appellant is acting in good faith and not for the purpose of delay. The refusal of the trial judge to permit the appellants in this case to pay rental into escrow during the pendency of the appeal because said appeal was taken in bad faith and for the purpose of delay did not result in any discrimination against the appellants based solely upon their poverty.

ARGUMENT

I. THE SURETY BOND REQUIREMENT OF SECTION 52-542, CONNECTICUT GENERAL STATUTES, IS FOR THE PURPOSE OF PROTECTING A PROPERTY OWNER FROM IRREPARABLE LOSS DURING THE PENDENCY OF AN APPEAL.

The summary process statute, of which Sec. 52-542, Conn. Gen. Stat., is a part, originated in 1806 in Connecticut and was an attempt by the General Assembly to provide a property owner with means of recovering possession of real property against an irresponsible and dishonest resisting tenant other than the lengthy and expensive common law action of ejectment.

> See: Connecticut Public Acts 1806, p. 729, Statutes of Connecticut 1808, p. 450.

The Connecticut statute was based on an English act which provided a summary manner for obtaining possession of a leasehold against a tenant who was either unable or unwilling to pay rent.

> 11 Geo. 2, c. 19 (1737)
>
> See: 2 McAdam, *Landlord and Tenant* (5th Ed.) § 269, p. 1135; and Berger, *Land Ownership and Use*, p. 360.

The summary process action is limited to those situations where there is a lease which has terminated either by time or

nonpayment of rent, or where there is occupation without right or privilege.

> Section 52-532, Connecticut General Statutes, Revision of 1958, Revised to 1968.

The case at hand was commenced because of nonpayment of rent for a period of three months.

The only defenses available to a tenant against a summary process action are to establish title which accrued after the lease in suit was given or to establish an equitable defense justifying late payment, nonpayment or withholding of rent.

> Section 52-534, Conn. Gen. Stat., Rev. of 1958, Rev. to 1968; *Wisentine* v. [illegible] 93 Conn. 633, 638; *Alpert* v. *Pelaquin*, 98 [illegible]; *Thompson* v. *Coe*, 96 Conn. 644, [illegible]

The record in this case establishes [illegible] appellants advanced seven special defenses before the [illegible] court. All of the defenses were procedural and none set [illegible] any equitable defense to the summary process action. Indeed, if the appellants' first special defense before the trial court is read with their trial brief it shows that the appellants were angry with the appellee because of the institution of a previous summary process action which was not prosecuted to effect. Accordingly, they arbitrarily withheld their rent from the appellee for three months. The trial court correctly entered a judgment for possession of the premises for nonpayment of rent. The trial court also made the following *dicta* in its memorandum of decision dated January 16, 1968.

> "The record in this case clearly shows what can happen to a summary proceeding where the process is abused by dilatory tactics, defenses interposed to delay or obstruct the proceeding, and every effort made to delay a trial of the case on the merits."

In the same memorandum of decision the trial court found that:

> "The evidence further establishes that rent in the amount of $72.00 per month in accordance with the terms of the lease has not been paid for the months of May, June and July of 1967. The evidence also establishes that no rent has been paid for any of the succeeding months of August, September, October, November and December 1967."

The appellee is a public housing authority existing under both state and federal law. Its operations are subject to control by the United States Department of Housing and Urban Development. Financing is by public bond issues and grant from the Department of Housing and Urban Development. The income from tenants is used to meet the public bond issues.

Against the above background the trial court, in January of 1968, had to decide the motion to waive the surety bond on appeal.

The requirement of posting a bond as condition upon the right of obtaining judicial relief is generally found in both federal and state courts.

> See: 31 U.S.C. § 518 (injunction to stay distress warrant); 29 U.S.C. § 107 (injunction in labor disputes); 28 U.S.C. 1446(d) (removal of cases);
>
> Also: Sec. 53-36a, Conn. Gen. Stat., (injunction to prevent discrimination in public accommodations); Sec. 52-185, Conn. Gen. Stat., (bond for prosecution of civil actions); Sec. 52-187, Conn. Gen. Stat., (actions against municipalities); Sec. 48-11, Conn. Gen. Stat., (eminent domain); Sec. 17-69, Conn. Gen. Stat., (juvenile court appeals).

It has long been settled that the Fourteenth Amendment does not prevent a state from prescribing reasonable and appropriate conditions precedent to the seeking of judicial relief through legal proceedings of a specified kind of class so long as the basis of the distinction is real and the conditions imposed have a reasonable relationship to a legitimate object.

> *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 542; *Jones* v. *Union Guano Co.*, 264 U.S. 171, 181;
>
> See also: 16 Am. Jur. 2d, *Constitutional Law*, § 535; 16A C.J.S., *Constitutional Law*, § 559.

Applying the above standard to the surety bond requirement of Sec. 52-542, Conn. Gen. Stat., it is clear that said statute prescribes reasonable and appropriate conditions with a legitimate object in mind. If an individual is to be allowed by statute to possess another's real property during the course of litigation, surely the property owner is entitled to the statutory protection of security for lost rent and other injuries which might be irreparable if no security is provided. To fail to do so would constitute a judicial deprivation or taking of property without due process of law in violation of the Fourteenth Amendment and without compensation in violation of the Fifth Amendment. In addition to violating the United States Constitution, the corresponding sections of the Constitution of Connecticut (1965) found at Article First, Sections 10 and 11, would be violated.

> See: *Dooley* v. *Town Plan & Zoning Commission*, 151 Conn. 304, 314.

Sec. 52-542, Conn. Gen. Stat., having been enacted with the legitimate object in mind of providing due process of law to a property owner during the pendency of an appeal by a tenant, and said statute having prescribed reasonable and appropriate conditions in the requirement of a surety bond, it is clear that the statute is constitutional on its face. The only remaining

question is whether said statute is unconstitutional when applied in the case of an indigent tenant.

II. THE SURETY BOND REQUIREMENT OF SECTION 52-542, CONNECTICUT GENERAL STATUTES, IS CONSTITUTIONAL AS APPLIED IN THE CASE OF AN INDIGENT TENANT.

There is considerable dicta in the decision of the Appellate Division of the Circuit Court below which would indicate that the filing of a surety bond is essential to the validity of an appeal in a summary process action. In its opinion of March 1, 1968 said court stated:

> ". . . The right to an appeal is not a constitutional one, nor one based upon principles of natural justice. It is but a statutory privilege which an aggrieved party has the right to avail himself of only when he has strictly complied with the provisions of the statutes and rules upon which the privilege is granted. *Bronson* v. *Mechanics Bank,* 83 Conn. 128, 133; see *Bennett* v. *United Lumber and Supply Co.,* 110 Conn. 536, 538; 'An appeal in this state is a statutory privilege accorded only if the conditions fixed by the statutes and rules of court for taking and prosecuting it are complied with.' *Kennedy* v. *Walker,* 135 Conn. 262, 266. 'Under its general authority to regulate appellate procedure the legislature has the power to require the giving of a bond or undertaking as a condition precedent to the right to appeal or sue or a writ of error, unless such power is clearly excluded by the constitution. Such statutes do not violate constitutional provisions granting the right of appeal, as they do not restrict or deny the right, but merely regulate the manner of exercising it, . . .' 4A C.J.S., *Appeal and Error,* § 502(b), p. 208. 'The statutes relating to summary process actions almost invariably authorize an appeal by the person against whom the judgment is given in the proceeding, such appeal being effective to stay the execution

of a judgment of dispossession only in case the appellant gives a bond or undertaking sufficient to satisfy any damage to the plaintiff caused by the continued withholding of possession.' 2 Tiffany, *Landlord and Tenant* (1912 Ed.) § 284, p. 1805; see 52 C.J.S., *Landlord and Tenant*, § 784(a); *Pollack* v. *Ro-An of New England, Inc.*, 1 Conn. Cir. Ct. 173, 174. 'Thus, it is left to the legislature to provide the manner of taking an appeal and the legislature has undoubtedly the power to provide such requirements and attach such conditions as are necessary to protect the adverse party.'

'Section 52-542 of the General Statutes, as amended by Public Act 509, § 4 (1961), provides that 'when any appeal is taken by the defendant in an action of summary process, he shall give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue . . .' A sufficient bond with surety is essential to a valid appeal; see *Palmer* v. *Des Reis*, 136 Conn. 627, 630; and is solely for the protection of the appellee. *Palmer* v. *Des Reis*, 135 Conn. 388, 389.' "

There is no question that the legislature intended the surety bond requirement in Sec. 52-542, Conn. Gen. Stat., to apply to indigents as well as non-indigents. Nor is there any statutory provision for the waiver of the surety bond requirement in an appeal in a summary process action. The appellants contend that this requirement effects a classification based on poverty or affluence in violation of equal protection of the laws and due process.

While this Supreme Court has held that the right of freedom from imprisonment upon an unjust conviction cannot be conditioned upon the payment of a fee, *Griffen* v. *Illinois*, 351 U.S. 12, *Smith* v. *Bennett*, 365 U.S. 708, *Lane* v. *Brown*, 372 U.S. 477; it has not yet gone so far as to hold that no state services may be conditioned upon the payment of a fee as long as the fee is

reasonably considered by the legislature to be required for legitimate state purposes. See: *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 668. The requirement of posting a bond for the protection of an adverse party and to prevent frivolous appeals is even further removed from the above-cited prohibitions than the payment of a fee to the state.

While it may be desirable in our society for the General Assembly of Connecticut to provide an *in forma pauperis* procedure in civil matters to indigents, it does not violate the federal Constitution to fail to do so. Nor does this Supreme Court sit to enact social legislation by judicial *fiat.*

> See: *Lochner* v. *New York,* 198 U.S. 45, 75; *Harper* v. *Virginia Board of Elections,* supra at 669; *Williams* v. *Shaffer,* 385 U.S. 1037, 1041.

III. THIS CASE DOES NOT PRESENT A FEDERAL QUESTION.

Having concluded that the surety bond requirement is essential and that there is no statutory provision for waiver, it does not necessarily follow that an appeal not accompanied by a surety bond is void.

> *State* v. *Pallotti,* 119 Conn. 70, 74; *Housing Authority* v. *Jones,* 5 Conn. Cir. Ct. 350, 354.

For one thing, the requirement of a surety bond may be waived by the appellee, *Jensen* v. *Nationwide Mutual Ins. Co.,* 147 Conn. 733, 723; for another, the court may set such conditions as will be adequate for the protection of the appellee.

> *Hink* v. *Bowlsby,* 199 Or. 238, 241; *Ricci* v. *Bove's Executor,* 116 Vt. 335, 339; *Waters-Pierce Oil Co.* v. *State,* 107 Tex. 1, 6; *Higgins* v. *Parker,* 48 Ill. 445, 448; *Booher* v. *Lowe,* 79 Ohio App. 490, 492.

The appellees foreclosed any waiver of the surety bond requirement by filing its objections to defendants' motion to waive surety bond on appeal dated January 19, 1968.

The appellants precluded any equitable consideration of their motion to waive surety bond on appeal by their use of dilatory tactics for the purpose of delay as found by the trial court. (Record Appendix, p. 23).

Whether the trial court properly exercised its discretion in ruling on the Motion to Waive Surety Bond on Appeal is really the only question on this appeal. As said exercise of discretion does not raise a federal question, this appeal ought to be dismissed for lack of jurisdiction.

It is undisputed that the trial court reached the following findings from the record:

> "1) the defendants have paid no rent since May 1, 1967, nor offered to pay any part of the rent due;
>
> 2) the record in the case is full of dilatory tactics, and is loaded with defenses interposed to delay and obstruct the summary process proceeding;
>
> 3) the instant motion is another effort to avoid the clear obligation required by Section 52-542 of the Connecticut General Statutes requiring the furnishing of a sufficient bond with surety to the plaintiff to answer for all rents that may accrue;
>
> 4) it clearly appears to this court, having tried this case, that this appeal is being taken for the purpose of delay."
>
> Memorandum of Decision on Motion to Waive Surety Bond on Appeal - January 19, 1968 (Record Appendix, p. 23).

In view of these findings, the trial court can not be said

to have abused its discretion in denying the Motion to Waive Surety Bond on Appeal.

CONCLUSION

The issue of whether an indigent should be allowed to appeal in a summary process action without the filing of a surety bond is a legitimate social issue. There undoubtedly is a trend toward allowing greater latitude toward proceeding *in forma pauperis* in civil actions. However, these accomplishments have been achieved by Congressional legislation with regard to federal civil actions and by legislation in some twenty-three of the states.

> See: *"The Indigent's Right to Counsel In Civil Cases"*, 76 Yale L. J. 545, 559.

It may be that at some future time the Connecticut General Assembly will join other states in providing *in forma pauperis* in civil proceedings but, to date, it has not done so.

Even if this Supreme Court felt that it had jurisdiction to require a waiver of the surety bond requirement, it would be hard put to justify such an application under the facts of the instant case. The record is devoid of any of the slum problems which are usually associated with indigent tenants and advocated in justification of nonpayment of rent.

> See: Schoshinski, *"Remedies of The Indigent Tenant: Proposal for Change"*, 54 Geo. L. J. 519.

Nor does the record reveal that the appellee was using the summary process action to punish the appellants for failure to conform to the mores of the so-called white middle class America.

> See: Friedman, *"Public Housing and The Poor: An Overview"*, 54 Cal. L. Rev. 642, at 659 *"Terms and Evictions"*.

This case is a simple case of nonpayment of rent without justification.

This appeal should be dismissed and the decision of the Appellate Division of the Connecticut Circuit Court should be affirmed.

Respectfully submitted,

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